United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7354

To be argued by
ARTHUR E. McINERNEY

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IMBRAHIM, Individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellees,

against

JOSEPH CURRAN and SHANNON WALL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES COURT OF APPEALS
FILED
NOV 29 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRIEF FOR PLAINTIFFS-APPELLEES

DUER & TAYLOR
Attorneys for Plaintiffs-Appellees
Office & P. O. Address
74 Trinity Place
New York, New York
(212) 962-1505

ARTHUR E. McINERNEY
JOHN S. CHAPMAN, JR.
Of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—4570

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, Individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellees,

-against-

JOSEPH CURRAN, SHANNON WALL,

Defendants-Appellants.

- x

BRIEF ON BEHALF OF PLAINTIFFS-APPELLEES

The question on this appeal is:

"Was the order appealed from an abuse of discretion?"

The answer should be no. The order was a fair and an appropriate exercise of the Court's discretion.

Facts

The relevant events cannot be segmented, as the appellants would do. A view of the entire history of the case, as Judge Bonsal had, is required to see the unworthiness of the appellants' position.

This court is familiar with much that has gone before (Morrissey v. Curran, [CA 2, 1970] 423 F2d 393,

cert. denied 399 U.S. 928; Morrissey v. Curran, [CA 2, 1973] 483 F2d 480, cert. denied 414 U.S. 1128; Morrissey v. Curran [CA 2, 1975] 526 F2d 121).

On the first mandate from this court Judge Bonsal made an order dated July 8, 1970, reading:

> "The defendants are enjoined from employing counsel paid or to be paid with Union funds" (80a, appellants' brief p. 4).

Both Curran and Wall were defendants and were covered by this order. Up to that time they had been represented by Mr. Freedman, NMU's general counsel*. In nominal compliance with the July 8th order they retained Messrs. Bloom and Epstein to represent them in place of Freedman (See page 4 Appellants' brief). Bloom and Epstein also represented Freedman individually and as trustee of the Officers' Pension Fund (OPF). Although OPF consisted entirely of union funds, Bloom and Epstein were paid, from OPF, fees totalling $85,829.11. Curran and Wall paid nothing. They got a free ride at the expense of OPF.

Judge Bonsal found that Curran and Wall (78A):

---

* In the early stages Mr. Sovel, Mr. Freedman's partner to a great extent carried the ball for Curran and Wall. Now he is back in the final stages on this appeal.

> "* * * did not maintain the high standard required under Section 501(a) with respect to the Officers' Pension Fund."

He observed (72a) that they had not even followed the NMU constitution and that it had taken "the plaintiffs to bring it to the court's attention."

Curran dominated the trustees of the Pension Fund as well as NMU. Wall was his understudy. Both knew of the Perry situation and of the plan to retire Perry. Both knew that the plaintiffs were challenging the plan. If either had lifted his little finger in protest, the venture would have stopped in its tracks and the necessity for this entire expensive lawsuit obviated. As Judge Bonsal said (86a):

> "The evidence indicated that Curran dominated the people who had anything to do with the payment from the Officers' Pension Plan to Perry. Karchmer testified, 'Well, to go in to Joe (Curran) is a very fearful process'."

They were unworthy trustees but were saved from a financial charge because their behavior had had Freedman's sanction. Their escape was also prompted by the circumstance that both the NMU general fund and the OPF

had been made whole; the NMU general fund by the judgment against OPF ($674,222.60) and OPF by the judgment against Freedman and Perry ($272,740.50). There was no need to go further. As Judge Bonsal said: (85a)

> "However, the $41,250.01 (a part of the $674,222.60) has been recovered by NMU, so that even if he violated his fiduciary duty, there is no occasion for surcharging him in this amount" (words in parenthesis supplied).

After the entry of judgment, the Bromsen firm was substituted for Messrs. Bloom and Epstein as attorneys for Curran and Wall.

Freedman and Perry appealed. The Bromsen firm also appealed on behalf of Curran and Wall. The plaintiffs cross-appealed against Curran and Wall. This cross-appeal by the plaintiffs was necessary. Had this court reversed the judgment against Freedman, Curran and Wall, without the cross-appeal, would not have been present to "catch the ball."

Parenthetically, their duties as §501 trustees dictated their striving alongside the plaintiffs to obtain and sustain the judgments against Freedman and against Curran's good friend, Perry. Instead they have opposed

the plaintiffs' efforts throughout these proceedings.

After the determination of the appeal, the plaintiffs learned that in spite of Judge Bonsal's July 8, 1970 order, attorneys representing the defendants, including Messrs. Bloom and Epstein, had been paid substantial fees from the OPF (union funds). They called this to Judge Bonsal's attention and asked him to punish the defendants by requiring them to refund these fees to OPF. Judge Bonsal granted the request as to the defendants Karchmer and Segal to the extent of directing refunds totalling over $80,000.00. On appeal, Freedman was included among those punished and $7,059.84 was added to this amount to be refunded.

Bloom and Epstein got away with their $85,000.00 fee (48a) for the reason that, as this court (Lumbard, C.J.) said no part of the $85,000.00 fee had been allocated to Curran and Wall. And, he said "neither Curran nor Wall claimed to have paid personally any part of the Bloom and Epstein fee". Morrissey, et al v. Curran, et al, 526 F2d 121, 129, footnote 12. The point is that a part should have been so allocated. They represented Curran and Wall as well as Freedman (56-57a).

In that posture, Judge Bonsal was requested to lift the order of July 8, 1970 and allow the Bromsen firm a fee for their services, payable from union funds. The

NMU appeared on that application and joined in the prayer and requested that the fee allowed be charged to the plaintiffs in this action (23-26a and 69-71a). That request if granted, would have been a bitter recompense for the plaintiffs efforts* in restoring to NMU over $674,222.60 and to OPF over $359,000.00 ($272,740.50 and over $87,000.00).

ARGUMENT

POINT I

DISCRETION WAS PROPERLY EXERCISED AND NOT ABUSED

This is a suit in equity. The restraining order of July 8, 1970 was an equitable remedy. It had been made not only on mandate from this court but also on the basis of well accepted principles of labor law (Tucker v. Shaw [CA 2, 1967] 378 F2d 304).

The principle of indemnification, (sought to be applied here) is an equitable principle. There is no requirement that defendants must be indemnified. Whether

* Here the equities come clearly into focus. Cutting through the window dressing, we know that NMU does what it is commanded to do by Curran and Wall. Curran and Wall call the shots. They called the shots that precipitated this litigation. Now they want three ordinary seamen charged with their (Curran and Wall) legal expenses.

or not they should be is discretionary and will be allowed only when it appears that it would be inequitable to refuse. Neither Koonce v. Gaier, (S.D. N.Y., 1971) 320 F. Supp. 1321 nor Holdeman v. Sheldon (CA 2, 1962) 311 F2 2 hold that the union officers must be indemnified. They merely hold that under proper circumstances they "may" be indemnified. The plaintiffs do not quarrel with this.

The provision of the NMU constitution cannot be used to convert "may" to "must". In the first place, the NMU constitution does not mandate the indemnification requested. A condition, imposed by the constitutional provision, is that the officer be "successful" in his defense. Curran and Wall have not been successful. As Anderson, C.J. said in Morrissey v. Curran et al (CA 2) 423 F2d 393 at p. 399:

> "The defendants also argue that the district court 'has not imposed any personal liability upon the defendants from which they needed to be "exculpated,"' but we do not agree with this argument. The district court ordered the defendants to account for all moneys paid into the Officers' Pension Plan and return to the NMU all moneys received by the trustees for the benefit of non-officers with interest. It follows that if they are unable to recoup that money, they may be held personally liable."

The Bromsen firm first appeared for Curran and Wall on the appeal from the final judgment after the accounting. All the parties appealed from that judgment. Curran and Wall complained on that appeal that the fee allowed plaintiffs' counsel was excessive and should be reduced. They were not successful on that appeal.

On the last appeal (on refund of fees paid from union funds) Curran and Wall were successful only because Bloom and Epstein had not allocated,as they should have done, any part of their fee to the services performed by them for Curran and Wall.

After all, can a trustee who was found not to have main' ined "the high standard required under §501(a) with respect to the Officers' Pension Fund" be said to have been successful. As Anderson, C.J. said, they had escaped personal liability only because the funds had been made whole from other sources. If Freedman had managed to escape, and he argued vigorously here that he should be absolved, Curran and Wall would have been off the hook had the plaintiffs not taken the cross-appeal. Judge Anderson's comment, quoted above, would have been of no avail without their prese They were successful only because Freedman was not. Had the plaintiffs neglected to keep Curran and

Wall in the case they might very well have subjected themselves to a charge of negligence in their duty to NMU. A similar point was made by the Court of Appeals in Highway Truck Drivers etc. v. Cohen, (CA 3) 334 F2d 378, cert. denied 379 U.S. 921, in which Judge McLaughlin said at page 381:

> "Not to so proceed (with efforts to collect a judgment pending appeal) might very well subject plaintiffs themselves to a charge of negligence in their duty on behalf of the Local."

Finally, no provision of the NMU constitution should be allowed to override the aims, purposes and effects of LMRDA. Among these are to encourage members of Labor unions to bring their grievances to a federal court without intimidation or fear of reprisal. Union officers are protected from strike suits by the requirement of a preliminary order, authorizing the action. From the date of that order in this case to the end the court was in control, guided only by its own conscience, discretion and by principles of equity.

The provision of the NMU constitution upon which the defendants rely, may not be invoked to override what the court may deem to be a proper disposition of an issue arising during the course of the action.

Under §501 Curran and Wall were trustees of Union funds. The plaintiffs were beneficiaries. Whether or not a trustee, under a given set of circumstances, should be indemnified will rest in the sound discretion of the chancellor; particularly where there is a threat to pass the charge along to the plaintiff-beneficiaries.

Thus in Highway Truck Drivers etc. v. Cohen (CA 3) 334 F2d 378, cert. denied 379 U.S. 921 an express provision of the union constitution to pay specific fees of attorneys did not deprive the court of discretion to dispose of the issue upon equitable grounds. The court did indicate that a different result might be reached if the defendants were ultimately successful. But that is merely to say that in that event the equities would then lean in the defendants favor.

The simple fact that a trustee has not been surcharged financially, does not remove the issue from the discretionary category. See Matter of Estricher (Sur. Ct. N. Y. Co.) 202 Misc. 431, in which Surrogate Frankenthaler, although declining to punish the trustee for his breach of trust, nevertheless refused to indemnify him from the estate for attorney's fees incurred in his defense.

In this very case, this Court (Morrissey v. Segal (1975) 526 F2d 121) required Segal and Karchmer to pay attorneys' fees incurred notwithstanding their "successful" defense. At page 126 Lumbard, C.J. said:

> "Freedman, Segal and Karchmer, as trustees of the NMU Officers' Pension Fund, were charged with the highest level of responsibility and care in their management of the trust property. Having failed to conform to that standard with regard to the Perry payment, the defendants are liable for their attorneys' fees attributable thereto.
>
> '[T]he trustee is not entitled to indemnity if the incurring of the expense became necessary because of his own fault. Thus if the trustee negligently permitted a third party to obtain possession of the trust property the expenses of litigation which resulted must be borne by the trustee personally.' 3 Scott, The Law of Trusts, §245, at 2155 (3d ed. 1967).
>
> Any contrary result would undermine both the protection to union members and deterrence of union officials intended by Section 501."

The question then comes down to this: Was Judge Bonsal's order an abuse of discretion?

Judge Bonsal had been in charge of this matter from its inception. He was in a better position,

than any other judge could ever possibly be, to resolve the equities. He was quite aware of the part that both Curran, as the dominant character in NMU, and Wall, as Curran's understudy, had played in the events which had precipitated this action (64-67a).

In the exercise of his discretion he refused to lift the restraining order and grant indemnification. In doing so, he did not abuse his discretion. After all, Curran and Wall had escaped surcharges on thin and narrow grounds. Their untrustee-like behavior simply did not appeal to the conscience of the court.

We speak of indemnification because that is the only approach available to the appellants. But actually no loss has been incurred by Curran and Wall from which they can be indemnified. No part of any fee has been paid by Curran and Wall (9a). Mr. Altier does not even say that they have been billed. It may be doubted that anyone ever intended to bill Curran and Wall directly*.

---

* The entire thrust of this application was to saddle the fee on plaintiffs' shoulders thereby dramatically discouraging union members from enforcing their rights under LMRDA. Union purges must come from within (See New York Sunday Times Magazine Section, November 7, 1976, p. 31 "Can Anybody Clean Up The Teamsters?" A. H. Raskin.) Congress never intended to permit the imposition of costs against a union member who proceeds against his union's officers in good faith. Surely no member who has succeeded to the extent these plaintiffs have should be faced with a "penalty" such as that provided for in Article 21 of the NMU Constitution.

The July 8, 1970 order was by-passed by the defendants. Throughout they were represented by counsel "paid" (Freedman and Bloom and Epstein) "or to be paid with union funds" (the Bromsen firm).

CONCLUSION

THE ORDER SHOULD BE AFFIRMED.

Respectfully submitted,

DUER & TAYLOR

By _____
A Member of the Firm
Attorneys for Plaintiffs-Appellees
Office & P. O. Address
74 Trinity Place
New York, New York, 10006
(212) 962-1505

Arthur E. McInerney
John S. Chapman, Jr.
Of Counsel

United States Court of Appeals
for the Second Circuit!

James M. Morrissey, Joseph Padilla, Ralph Imbrahim, individually and on behalf of the members of the National Maritime Union of America,
Plaintiffs-Appellees,

against

Joseph Curran and Shannon Wall,
Defendants-Appellants.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

John Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 12 State Street, Valley Stream, New York

That on November 29, 1976, he served 2 copies of Brief

on

Charles Sovel, esq.,
346 West 17th Street,
New York ,New York, 10011

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

John Esposito

Sworn to before me this
29th day of November, 19 76

John V. Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30 0952350
Qualified in Nassau County
Commission Expires March 30, 1977